

**BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT
PRACTICE MANUAL**

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INTRODUCTION

This manual is intended to serve as a guide for attorneys and litigants appearing in proceedings before the Bankruptcy Appellate Panel of the Sixth Circuit (“BAP”). The manual should be read in conjunction with the Rules of the BAP and Parts VII and VIII of the Federal Rules of Bankruptcy Procedure.

The central office of the BAP is located in Cincinnati, Ohio. The Clerk of the BAP, Leonard Green, is also clerk of the U.S. Court of Appeals for the Sixth Circuit. The panel clerk’s office is located in Room 540 of the Potter Stewart U.S. Courthouse and is open Monday through Friday, 8:30 A.M. to 5:00 P.M. All filings made with the panel are to be made using ECF, the Sixth Circuit’s adaptation of the Electronic Court Filing program implemented throughout the federal judiciary.

The clerk’s office welcomes telephone inquiries (513.564.7000) from counsel regarding rules, practices, procedures, and special problems.

I. INITIATING THE APPEAL

The information in this manual is intended to assist you in your appeal of a judgment or order of a bankruptcy judge in a district which has authorized appeals to the BAP. *See* 28 U.S.C. § 158(b)(6). Currently the district courts for the Eastern District of Kentucky, the Western District of Michigan, the Northern District of Ohio, the Southern District of Ohio, the Middle District of Tennessee, and the Western District of Tennessee have made such an authorization.

(a) Final Order or Judgment. If the order or judgment from which you are appealing is final, you may appeal as of right. 28 U.S.C. § 158(a)(1). The party taking the appeal (the appellant) must initiate the process by filing a notice of appeal with the clerk of the bankruptcy court within fourteen days of the filing of the order or judgment being appealed. Fed. R. Bankr. P. 8001(a), 8002(a). The bankruptcy clerk will serve all parties other than the appellant with a copy of the notice of appeal. Fed. R. Bankr. P.8004. A fee of \$255 is required to be paid to the clerk of the bankruptcy court at the time the notice of appeal is filed.

(b) Interlocutory Order. A party seeking to appeal an interlocutory order must first seek and obtain the permission of the BAP to do so. 28 U.S.C. § 158(a)(3); Fed. R. Bankr. P. 8001(b), 8003. The motion must be filed with the clerk of the bankruptcy court and must be accompanied by a notice of appeal and the filing fee of \$255. Fed. R. Bankr. P. 8001(b). The party filing the motion is required to serve a copy on all other parties. Fed. R. Bankr. P. 8008(b). Any party opposing the motion for leave to appeal is entitled to file a response with the clerk of the bankruptcy court within fourteen days after service of the motion. Fed. R. Bankr. P. 8003(a).

The bankruptcy clerk will forward the notice, the motion for leave to appeal, and any answers, to the panel clerk as soon as the answer period has run. The panel clerk, in turn, will submit these documents to the panel which has been assigned to decide the motion. As soon as a decision has been filed, the panel clerk will notify the parties and the clerk of the bankruptcy court.

(c) Election to Have Appeal Determined in District Court. In those districts that have authorized appeals to the BAP, **every appeal is determined by the BAP unless:**

(1) The appellant or cross-appellant files with the clerk of the bankruptcy court, at the time the notice of appeal is filed, a separate written statement indicating the election to have the appeal determined by the district court; or

(2) any other party to the appeal elects to have it determined by the district court by filing with the panel clerk, within thirty days of service of the notice of appeal, a separate written statement evidencing that intention.

28 U.S.C. § 158(c)(1). If a party other than the appellant files with the panel clerk any document other than a notice of appearance, that party is deemed to have waived the remainder of the thirty-day election ("opt-out") period, with the result that the case will remain with the BAP for the duration. Once a party has made its election, it is binding on any cross-appeal from the same order or judgment filed by that party, unless the BAP orders otherwise. *See In re Linder*, 215 B.R. 826 (B.A.P. 6th Cir. 1998).

REMEMBER

File the notice of appeal with and pay the fee to the clerk of the bankruptcy court.

Appeals will remain with the BAP unless and until a party affirmatively and timely elects to have it determined by the district court.

II. OPENING THE APPEAL

(a) Case Opening Letter. As soon as the panel clerk receives from the clerk of the bankruptcy court a copy of the notice of appeal and a copy of the order or judgment being appealed, the case will be entered on the BAP's docket and assigned a docket number.

Once the appeal has been opened, the panel clerk will send to counsel for all parties a letter informing them of the date the appeal was opened and the number assigned. The case opening letter will also state whether the filing fee requirement has been satisfied and, if not, the letter will serve as notice that, if the fee is not paid within the deadline indicated, the appeal may be dismissed for want of prosecution.

(b) Assignment of Panel. A case is assigned to a panel as soon as it is filed. A judge will not be assigned to a case which originates in his or her home district. 28U.S.C. § 158(b)(5).

REMEMBER

You will receive a letter from the panel clerk as soon as the appeal is docketed. The letter contains important instructions and should be read at once.

III. PREARGUMENT CONFERENCE AND MEDIATION

Sixth Circuit BAP Rule 8080-2 describes a procedure for the review of appeals shortly after filing to determine whether a preargument conference would benefit the panel or the parties and to explore the possibilities of settlement or simplification of the issues.

The conference may be conducted by one of the Sixth Circuit mediation attorneys - each of whom is a seasoned attorney and mediator - or by a panel judge designated by the Chief Judge. If a judge participates in a conference, the judge will not later sit on a panel which considers any aspect of the appeal.

This program parallels the highly successful preargument conference program which has been in place in the Sixth Circuit Court of Appeals for twenty years.

REMEMBER

You may request a preargument conference if you think it would be helpful.

IV. THE RECORD ON APPEAL AND THE STATEMENT OF ISSUES

(a) The Record on Appeal. As is the case with any appellate court, review is predicated on the record of proceedings before the lower court, and, for that reason, it is imperative that the appellant take the necessary steps to ensure the prompt and complete preparation of the record.

The appellant is required to file with the clerk of the bankruptcy court, within fourteen days of the filing of the notice of appeal, a designation of those parts of the record developed before the bankruptcy court that are to comprise the record on appeal. The appellee may file a designation of additional items to be included in the record on appeal within fourteen days after service of the appellant's designation. Fed. R. Bankr. P. 8006. Individual bankruptcy courts may differ on exactly how they want this designation to be made, so you should check the particular bankruptcy court's local rules and procedures for doing so.

Rule 8006 of the Federal Rules of Bankruptcy Procedure also requires that any party designating a transcript as part of the record must file a written request for the transcript with the court clerk and deliver that request to the court recorder *immediately* after filing the designation. Any party ordering a transcript for the appeal must make satisfactory financial arrangements with the court reporter(s) upon filing the designation of record.

Court reporters are expected to prepare the transcript and deliver it to the bankruptcy clerk within thirty days of the date when financial arrangements were completed. A court reporter who cannot make that deadline must seek an extension of time from the panel clerk.

The failure of an appellant to arrange for the timely completion of the record on appeal may lead to dismissal of the appeal for want of prosecution.

(b) Statement of the Issues. Rule 8006 also requires that the appellant file with the clerk of the bankruptcy court, within fourteen days of the filing of the notice of appeal, a statement of the issues to be presented.

REMEMBER

Think carefully about what should be included in the record on appeal, and then file your designation of the record with the clerk of the bankruptcy court.

Order and make arrangements to pay for all necessary transcripts as soon as possible.

File your statement of issues with the clerk of the bankruptcy court.

V. MOTIONS

(a) In General. Regardless of the nature of the motion being filed, you must electronically file with the panel clerk the motion itself and any memorandum of law or other documentation offered in support of the motion. The specifics of form and content are contained in Rule 8011(a) of the Federal Rules of Bankruptcy Procedure. Make certain that you include a certificate of service with your motion. Fed. R. Bankr. P. 8008(d).

(b) Response. Rule 8011(a) allows any party to file a response to a motion other than one for a procedural order within seven days after service of the motion. The panel may, however, lengthen or shorten that time.

(c) Determination of the Motion. Motions are ruled upon by the panel clerk or by a judge or panel of three judges, depending upon the type of motion.

(1) Certain procedural motions can be decided by the panel clerk without submission to a judge. 6th Cir. BAP LBR 8011-2(a). These include:

- Motions which are procedural, or deal with preparation or filing of the briefs or appendix;
- Motions for voluntary dismissal;
- Motions for dismissal for want of prosecution;
- Motions for extensions of time;
- Motions to withdraw or to substitute counsel; or
- Any other type of motion delegated to the clerk by the panel which is subject to disposition by a single judge pursuant to Rule 8011(e) of the Federal Rules of Bankruptcy Procedure.

Any rulings on motions by the panel clerk will show that they were entered by him or her pursuant to 6th Cir. BAP LBR 8011-2(a). A party may seek reconsideration of such a ruling by a judge or a panel by filing a motion for reconsideration within fourteen days of service of notice of the entry of the order. Fed. R. Bankr. P.8011(b); 6th Cir. BAP. LBR 8011-2(b).

- (2) All other motions are referred to the panel which is assigned to the appeal. This includes motions for certification of direct appeal to the Sixth Circuit Court of Appeals under 28 U.S.C. § 158(d)(2). It is extremely unlikely that a panel will want to have oral argument on the motion. *See* Fed. R. Bankr. P. 8011(c). If it does, it will give you the appropriate direction.
- (3) An appeal may be expedited upon a showing of good cause. If an appeal is ordered expedited, the panel clerk will fix a briefing schedule that permits the appeal to be set for oral argument at an early date, or otherwise as directed by the panel. The panel clerk will usually have some idea of the approximate date of when the hearing will be, and can advise counsel accordingly when the order is issued.
- (4) Upon filing of a motion for reconsideration, a panel may reconsider its own action. A motion for reconsideration must be filed not later than fourteen days after the entry of the order or judgment sought to be reconsidered. *See* Fed. R. Bankr. P. 8015. A motion for additional time or for permission to file out of time is referred to the panel assigned to the appeal. Counsel should not assume that a request for additional time will be granted.

(d) Emergency Motions. Situations will arise in which motions are filed which will require panel consideration and ruling very quickly. *See* Fed. R. Bankr. P. 8011(d). It is expected that as soon as it becomes likely that an emergency motion will have to be filed, counsel will contact the

panel clerk immediately for direction. In no event should counsel go directly to a panel judge without first having made every practicable effort to contact the panel clerk.

Emergency motions often precede the filing of the record on appeal. It is therefore essential that the movant include with the motion, in addition to copies of the notice of appeal and the order or judgment being appealed, copies of all portions of the record which will be necessary for the disposition of the motion. Because of the abbreviated time frame within which the panel has to decide the motion, the normal response time will likely need to be shortened. The panel clerk will advise counsel of the deadline for filing the response.

REMEMBER

All motion papers are to be filed electronically with the panel clerk, and a copy must be served on all other counsel.

Call the panel clerk for guidance as soon as it appears likely that you have an emergency situation developing.

VI. THE BRIEFS AND APPENDIX

(a) In General. The brief is the principal vehicle by which a party tries to persuade the panel why it should decide the case in that party's favor. An effective brief will discuss the factual and legal issues cogently and succinctly and will call to the panel's attention relevant precedent to support the party's position.

When filing the briefs and appendices, parties should refer to the Sixth Circuit Guide to Electronic Filing available at www.ca6.uscourts.gov. See 6th Cir. BAP LBR 8008-1 and 8009-3.

(b) Briefing Notice from the Clerk. Upon the filing of the record on appeal with the panel clerk, he or she will issue to all parties a schedule for the filing of the brief and the appendix.

Extensions of time for filing either the brief or the appendix must be supported by a showing of good cause. The movant should not assume that the motion will be granted; rather, the assumption should be that the brief or appendix remains due as originally scheduled unless and until there is a ruling otherwise.

Compliance with the briefing and appendix deadlines is crucial to the timely processing and determination of the case. Failure of any party to the appeal to comply with these filing requirements may result in the imposition of sanctions, including the dismissal of the appeal for want of prosecution or the prohibition of that party from further participation in the appeal (including participation in oral argument).

(c) Requirements for the Brief. The brief must conform with a variety of formatting and mechanical requirements. Fed. R. Bankr. P. 8010 and 6th Cir. BAP LBR 8010-1:

- Opening and answer briefs are limited to 50 pages, and reply briefs to 25 pages.

- Briefs shall be submitted in compliance with the Sixth Circuit's Guide to Electronic Filing. Briefs shall be double-spaced in a font not less than 12 points in size with margins of not less than one inch.

(d) The Appendix. The appendix is a distillation of the record, containing those parts that are essential to the panel's understanding of the facts and legal issues necessary to an informed resolution of the appeal. Because there is only one original record and three panel judges located in separate cities will be preparing to decide the appeal, the appendix should be a self-contained document to which the judges can refer as they study the briefs.

Pursuant to the Sixth Circuit's Guide to Electronic Filing and 6 Cir. R. 30(a), appendices are no longer required in appeals to the BAP unless there are documents that a party is designating as part of the record that are not part of the bankruptcy court's electronic record. 6th Cir. BAP L.B.R. 8009-3. If it is necessary to file an appendix, the appellant should file one electronically with the initial brief. Fed. R. Bankr. P. 8009(b). If the appellee feels that the appendix submitted by the appellant omits necessary materials, a separate appendix can be filed by the appellee with the appellee's brief.

The party filing the appendix must:

- File the appendix as an electronic document in pdf format. In some instances, the court's electronic filing system may not be able to accept large scanned documents that may be necessary for an appendix. A filer encountering such a problem should contact the ECF Help Desk, available by phone at 513.564.7000 during the hours 8:00 A.M. to 5:00 P.M. Eastern time, Monday through Friday, or by e-mail at ca06-ecfhelp@ca6.uscourts.gov. The court will work with the filer to resolve technical problems with filing large documents. If necessary, the court will extend the deadline for filing an appendix when such problems are encountered.
- If there are multiple volumes to the appendix, make sure that each volume begins with an index to that volume

- Be paginated, with the table of contents setting forth the appendix page number at which each document starts, along with the record entry number of the documents from the bankruptcy court docket sheet.

REMEMBER

Make sure that your brief and appendix conform to all formatting requirements.

Make sure the appendix is paginated and includes a proper table of contents.

If you file a motion for an extension of time, do not assume that it will be granted.

The Panel strongly encourages complete transcripts. Partial transcripts may be filed if the complete transcript is voluminous. The Panel, however, may request further portions of a transcript or the entire transcript if needed, and this may delay the appeal.

VII. ORAL ARGUMENT

(a) In General. A panel has the discretion to decide appeals with or without oral argument, Fed. R. Bankr. P. 8012, and, if argument is to be held, to decide whether to have argument in person or to use teleconference or other means. Appeals will be scheduled for oral argument unless the panel unanimously agrees that it is not necessary. The brief of the appellant and the brief of the appellee shall include a statement explaining why oral argument should, or need not, be permitted. BAP LBR 8010-1(b). If counsel is satisfied that the party's position is fully presented in the brief and oral argument is not desired, it is not a dereliction of representation for counsel to so indicate in its statement regarding oral argument.

Oral argument affords the panel an opportunity to focus on any particular questions it may have about the case and to seek counsel's help in clarifying or expanding on the points made in the brief. Counsel should anticipate and welcome questions from the panel, since the answers to those questions will help the judges come to a better understanding of the case.

Counsel can expect that each of the panel judges will have prepared thoroughly in advance of argument and will be fully conversant with the facts of the case. **You should not simply read from your brief.** Argument time will generally be limited to 15 minutes per side, and counsel must carefully plan how to use that limited time to discuss the most salient issues. A party which has not filed a brief will not be allowed to present oral argument. 6th Cir. BAP LBR 8012-1(c)(1).

(b) Place and Time of Arguments. Arguments are generally scheduled the first Tuesday and Wednesday of February, May, August, and November, depending on the caseload. Arguments may be held in Cincinnati in a courtroom of the United States Court of Appeals for the Sixth Circuit or in another location convenient to the panel members and the attorneys for the parties.

Once the matter is set on the panel's docket, the panel clerk will notify counsel of the scheduled start time for arguments. Counsel should check in thirty minutes prior to the start of the docket. When arguments are heard in a Sixth Circuit courtroom in Cincinnati, counsel should check

in at the Sixth Circuit clerk's office, which is located in Room 524 of the Potter Stewart U.S. Courthouse (on 5th Street between Walnut and Main Streets in downtown Cincinnati). In the case of oral argument at other locations or oral argument by teleconference, the panel clerk will inform counsel of all the particulars (including where to check in) as soon as possible.

(c) Recording of Oral Argument. Each oral argument is recorded. A copy of a recording may be purchased from the panel clerk for a fee, currently \$26.

REMEMBER

Check in on time on the morning of your argument.

Budget your argument time wisely, discuss the most important issues, and do not simply recite from your brief.

Decide whether argument is likely to be necessary or helpful for your case.

VIII. DECISIONS

(a) In General. Decisions on motions will be made by way of a written order signed by the panel clerk and entered on the docket. In cases argued to a panel, the decision may be announced from the bench at the conclusion of argument, 6th Cir. BAP LBR 8013-1(a), or by an order or opinion issued after the panel has heard argument and taken the matter under advisement.

(1) Opinions. A copy of the opinion is sent to each counsel on the date of filing. In addition, each opinion that the panel determines should have precedential effect is sent for publication to West's Bankruptcy Reporter, Lexis, Westlaw, and other publishers. All BAP opinions are posted on the Sixth Circuit's website (www.ca6.uscourts.gov). Opinions can also be accessed through PACER at pacer.psc.uscourts.gov, 1.800.676.6856.

(2) Judgment. Once the clerk receives the written opinion of the panel or once the panel has announced its decision from the bench, a judgment will be prepared, signed, and entered on the docket, with a copy sent to all parties.

(b) Stay of Judgment. Unless the panel orders otherwise, the judgment will automatically be stayed for fourteen days to allow time to file a motion for rehearing pursuant to Rule 8015 of the Federal Rules of Bankruptcy Procedure.

IX. APPEAL OF BAP DECISION

Appeals from decisions of the BAP are taken to the United States Court of Appeals for the Sixth Circuit. The appeal is initiated by filing a notice of appeal with the panel clerk, specifying the order or judgment appealed from and naming the appellant(s), pursuant to the deadlines established in Rule 4 of the Federal Rules of Appellate Procedure.